

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-6214

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FOR THE SECOND CIRCUIT

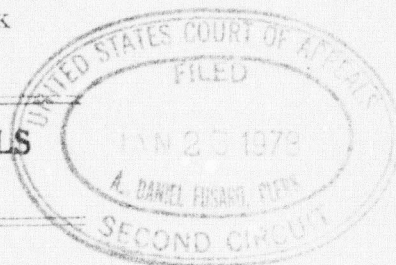
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
against

ROBERT L. VESCO, et al.,
Defendants,

WADE S. MALHAS, IRVING HOROWITZ, MARTIN JACOBY,
CHARLES BIRBARA, CORNELIUS A. HUBNER, MURRAY DRYER,
PHIL BIRBARA, N. E. BURGESS and WILLIAM ZEIDMAN,
Intervenor-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
(72 Civ. 5001)

BRIEF FOR INTERNATIONAL CONTROLS
CORPORATION-APPELLEE



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WILLIAM ZEIDMAN,

Intervenor-Appellants.

On Appeal from an Order of the United
States District Court For the Southern
District of New York (72 Civ. 5001)

BRIEF FOR DEFENDANT INTERNATIONAL
CONTROLS CORPORATION - APPELLEE

ISSUES ON APPEAL

In connection with the adoption by the District
Court of a plan for the holding of a stockholders' meeting
for defendant International Controls Corp. ("ICC"), certain

stockholders (referred to herein as "Intervenors") sought an order disqualifying the present four court-appointed* directors from being nominees for election by the shareholders. That request was denied by the Special Master in the preparation of the plan and by the District Court in approving it. In their brief on this appeal, intervenors pose only one issue.

"Should persons serving as court appointed directors pursuant to the equity powers[*] of a federal court be precluded from serving as officers or directors of the corporation when their period of court-stewardship terminates?"

We respectfully submit that in the instant case, the issue has two parts:

1. Under what legal authority or power could the four directors be disqualified?
2. Assuming that some legal authority or power existed to disqualify the directors, did the District Court's refusal to do so constitute an abuse of its discretion?

SUMMARY OF ARGUMENT

We will list in brief the reasons which we believe require that the decision of the District Court be affirmed.

* See discussion, p. 20, infra, as to whether the directors in question actually were installed in office by Court appointment.

1. The four incumbents are in all respects eligible to be nominees under the charter and by-laws of ICC and the laws of Florida (the State of ICC's incorporation). No statute or regulation has been cited or shown which would purport to disqualify them.

2. The Final Judgment of the District Court dated March 16, 1973 (the "Final Judgment"), pursuant to which the four directors accepted their office (A-11), contains no provision prohibiting said directors from standing as nominees for possible election at a meeting of stockholders. In no sense could they be deemed to have consented to being disqualified by accepting their directorships pursuant to said Final Judgment.

3. The very District Judge who had entered the Final Judgment declined to accept Intervenor's contention that a prohibition against nomination of the incumbents for possible election by the stockholders was reasonably to be read into or implied from the provisions of the Final Judgment.

4. The Securities and Exchange Commission at whose instance the Final Judgment had been entered and which submitted Recommendations for a plan for holding the election (A-371) did not take the position that persons serving as directors under the Final Judgment were disqualified from

standing for election by the stockholders.

5. The present members of the Board would be only four candidates participating in an election the plan for which contemplates that there could be many other nominees (A-496).*

6. The Board of Directors to be elected will consist of ten persons (A-451). Thus, even if all of the four present members are elected, they will constitute only a minority of the Board.

7. Under the plan adopted below, the company's funds may not be used to solicit proxies or votes for the election of the present directors or any other candidates (A-466).

8. ICC's business affairs and financial conditions have markedly improved under the stewardship of the incumbent board (A-188). This has been recognized by the stockholders of ICC, including appellants themselves (A-75). In these circumstances, the Special Master and the District Court found that the stockholders ought be given an opportunity to vote for the incumbents if they chose to do so (A-453, A-500).

* * *

* Since adoption of the plan, over 50 nominations have been received by the Special Master.

It is respectfully submitted that the foregoing considerations amply support the conclusion that (i) there was no legal authority or provision by which the Court could deprive the four directors of their right to be nominees for election to corporate office; and (ii) there were no reasons for the Court to do so even if it had authority.

STATEMENT OF THE CASE

ICC is a Florida corporation engaged in business in interstate commerce whose securities were publicly held and which was subject to the Securities Exchange Act of 1934 (Complaint, p. 5). During the period between 1968 and 1972, defendant, Robert L. Vesco, was its Chief Executive Officer, controlling stockholder and a member of its Board of Directors (Complaint, p. 2). While under Mr. Vesco's leadership, ICC became deeply involved in the affairs of IOS and its affiliated companies (Complaint, p. 8). IOS was a Canadian corporation engaged in the business of organizing and managing mutual funds outside of the United States and in related financial and business activities (Complaint, p. 5). On November 27, 1972, the SEC commenced the instant action against Vesco and numerous others, alleging massive securities frauds in the affairs of IOS and its affiliated and controlled entities. ICC was named as a defendant in said complaint

(Complaint, p. 2). In these proceedings, the SEC asserted that ICC was the victim of the wrongful and fraudulent acts of Vesco and his associates and that it, in turn, was the vehicle through which Vesco accomplished frauds upon others (Complaint, p. 8). The case spawned numerous related litigations in this District and in various jurisdictions abroad. Receivers and liquidators were appointed for various corporate entities that formed a part of the IOS complex in different sovereign jurisdictions, who in turn formed an International Committee working closely with the SEC (A-333, A-334). At the outset of the instant case, the SEC moved to have a receiver appointed for ICC. After negotiation by its counsel, ICC agreed to consent to a "Final Judgment," principal features of which were:

1. The replacement of ICC's Board of Directors with a new Board approved by the Court and satisfactory to the SEC.

2. The appointment of Special Counsel for ICC to investigate into and pursue ICC's rights with respect to matters arising from Vesco's management.

Contemporaneously with the entry of the Final Judgment, the District Court approved the following persons (the

incumbents) for positions on the new Board of Directors (A-11):

<u>Name</u>	<u>Description</u>
Allen M. Shinn (A-226)	Vice Admiral, U.S.N. (Ret.). Director of Pennzoil Company and Loral Corp.
Charles S. Desmond (A-225)	Former Chief Judge of the Court of Appeals of the State of New York; Of counsel to the firm of Diebold & Millonzi.
George D. Gould (A-225)	Former Vice Chairman of Board of Directors of Donaldson, Lufkin & Jenrette, Inc. (an asset management firm) and Chairman and Chief Executive Officer of Donaldson, Lufkin & Jenrette Securities Corp.; President, Chief Executive Officer and a director of The Madison Fund, Inc.
John Mosler (A-226)	Former Chairman of the Board and Chief Executive Officer of The Mosler Safe Company.
Joseph W. Weiner*	Prominent member of the securities bar.

At the same time, David M. Butowsky, Esq. was appointed Special Counsel.

Although the Court named, approved, and "appointed" the above persons, they were actually elected to office by the prior board in a series of resignations and replacements contemporaneous with the implementation of the Final Judgment and as part of ICC's performance of the Final Judgment on Consent (A-326).

* Since deceased. Mr. Weiner was not replaced on the Board.

In this way, the question of whether the Federal Court had the power to "appoint" directors for a corporation organized under the laws of the state of Florida was avoided.* Instead of bypassing the state law corporate structure by appointing a receiver for the corporation's property or to manage its affairs, the Final Judgment provided:

"Said interim board of directors shall consist of at least three persons, shall be satisfactory to plaintiff Commission, shall replace the existing board of directors of International Controls, and shall have full power under applicable corporate law to conduct the affairs of International Controls in conjunction with the special counsel, subject to the terms and conditions of the Final Judgment." (A-16-17) (Emphasis added.)

In the period which followed the entry of the Final Judgment, the Court appointed Board of Directors proceeded to perform their duties chief of which were:

(i) Managing the affairs of the corporation, which was a substantial multi-division industrial company having serious financial problems (A-187).

(ii) Reviewing the work of Special Counsel and General Counsel, who were engaged in pursuing claims against Vesco and persons affiliated with him (A-189) and dealing

* For a discussion of this problem and other questions raised by remedies recently utilized in resolving certain types of securities cases, see, Note, Court Appointed Directors, Ancillary Relief in Federal Securities Law Enforcement Actions, 64 Georgetown L.J. 737 et seq (1976).

with very substantial claims against the company by others arising from Vesco's activities.

(iii) Dealing with important questions of financial policy in attempting to restructure the company (A-191).

In January 1976, Intervenors petitioned the District Court to compel the holding of a stockholders' meeting. The incumbent board submitted its response showing why such a meeting had not been held and what unfinished business lay ahead for the incumbent board (A-49). On Recommendation of the SEC (A-107) not opposed by the company, the Court directed that Special Counsel file his report on or before August 15, 1977 and that the directors file their report on or before October 15, 1977 after receiving Special Counsel's Report. The Court withheld directing a holding of a stockholders' meeting on the assurance by the company that it would hold a meeting at the earliest possible time but in any event on or before December 20, 1977 (A-147).

In late July 1977, when it appeared certain that Special Counsel's Report would not be ready on schedule, the Board proceeded with its own Report anyway (A-185 - A-222) and the company took steps to set a stockholders' meeting for October 1977. The Board of Directors nominated a management slate of ten directors, four of whom were the present incumbents. Proxy material was prepared in the customary way and a record date

and meeting date were announced (A-177). Intervenor-Appellants moved to set aside the record date and meeting date and ultimately moved to enjoin the meeting (A-301). As a result of these proceedings, the Court referred the matter to a Special Master to make recommendations with respect to a plan for the holding of a meeting. In their motion before the District Court (A-301) and in proceedings before the Special Master in which the parties and the SEC submitted proposals for a plan (See Appellants' Supp. App.), the Intervenor urged that in any such election the incumbent directors be disqualified from standing as nominees. This request was denied by both the Master and the District Court in the plan that was ultimately adopted (A-445, A-456).

A great deal of Intervenor's brief is devoted to matters which are really not issues on this appeal. These are:

- (1) Whether the holding of a stockholders' meeting has been unduly delayed.
- (2) Whether ICC proceeded improperly in seeking to hold a stockholders' meeting in a conventional way in October 1977.

We herewith respond to these points:

1. The reasons why a stockholders' meeting has not been held since the installation of the present board in

April 1973 are set forth in the Record (A-49, A-63). Under the Final Judgment, a stockholders' meeting could be held only upon application of the SEC (A-16 - A-17). Management did not ask the SEC to apply for a meeting because it believed its work was not completed. The extreme complexity of ICC's involvement in the unresolved and constantly unfolding IOS situation being investigated by Special Counsel (A-52) presented numerous problems going to the heart of the company's existence. Not the least of the problems facing the Board was the fact that the company was beset by the existence and threat of massive claims which, if successful, would completely wipe out any equity in the company for the common stockholders. Because of this, and other massive contingencies, including a claim by the IRS for income taxes arising from the same facts, its auditors refused to certify its financial statements (A-57). Certain claimants who were liquidators of IOS entities alleged that through the vehicle of ICC Vesco and others had gained control of IOS and its affiliates and had converted sums of money from the said claimants amounting to "many times ICC's net worth" (A-57). In addition, there had been (and is) litigation by persons who bought ICC common stock in the public markets and asserted that their purchases were induced by false financial statements relating specifically to the value of ICC's investments in and loans to IOS (A-58). All of these matters and several others were under inves-

tigation by Special Counsel who did not file his report until November 1977.

One of the advantages of having the company run by "court-appointed" directors was that the new Board gained acceptance among the fraternity of government-appointed liquidators of IOS entities and, through the good offices of the Securities and Exchange Commission and Special Counsel, were able to initiate joint settlement negotiations with the various IOS entities having claims against ICC (A-57) on a basis which would remove these liabilities and still leave ICC a viable economic entity. One of the conditions of said negotiations was that Special Counsel for ICC prepare and circulate, among the IOS-related entities, a comprehensive report of his investigations (A-334).

Indeed, when in the fall of 1977 ICC took steps to proceed with a stockholders' meeting in compliance with the sense of the April 1977 order of the District Court, certain of the IOS funds and the SEC itself interceded before the Court to prevent the holding of such a meeting before the Special Counsel's Report was filed and settlement negotiations were concluded. It was their view that holding a stockholders' meeting prior to receipt of Special Counsel's Report would upset these critical settlement negotiations and plunge

ICC into massive litigation with the IOS funds (A-333, A-342, A-371).

No fair review of this record can ascribe the delay in holding a stockholders' meeting to any cause other than the unprecedented circumstances in which ICC had found itself in the years following Vesco's departure and the efforts of the incumbent board, Special Counsel and the SEC to deal with the problems raised thereby.

The second argument made by the Intervenor-Appellants is that the "court-appointed" board acted improperly when it sought to hold a meeting in the fall of 1977.

The reasons for the board's having sought to hold that meeting are fully set forth in the record (A-233, A-318, A-49). Briefly stated, the incumbent board had agreed to have a meeting at the earliest possible date, but in any event no later than December 20, 1977 (A-147). The meeting had been delayed to December 20, 1977 in order to permit the parties to receive the report of Special Counsel. When in July 1977 it became clear that said report would not be ready on the date scheduled or in time to be considered for a meeting on December 20, 1977, the board concluded that there was no reason to delay the stockholders' meeting and determined to proceed forthwith without the Report for a meeting to be held in October 1977 (A-178).

Acting pursuant to the by-laws, the board fixed the number of directors to be elected at ten and nominated a slate of ten qualified people (including the four incumbents). This was reflected in a Notice of Meeting and Proxy Statement following the conventional form for a publicly held corporation under the Securities Exchange Act of 1934 (A-223). The Board in no way sought to prevent other stockholders from making nominations or soliciting proxies.

The company would have insisted on its right to go forward with the October meeting, but the IOS entities warned the company that settlement negotiations would come to an end if the meeting were held and that, unless the IOS entities were assured that they would have Special Counsel's Report and an opportunity to conclude the negotiations prior to the meeting, the said IOS entities would forthwith bring actions against the Company for well in excess of \$100 million (A-339). On this showing, the SEC in effect changed its position from that of the previous April and recommended that the stockholders' meeting be delayed.

The District Court and the company acceded to the request of the IOS claimants and the SEC that the meeting be delayed in order to permit Special Counsel to make his report and to permit the settlement negotiations to be concluded if

possible (A-436). The meeting was postponed to April 1978. On the revised schedule, time permitted the preparation of a plan for a Court supervised election. ICC had no objection to the meeting being held under Court supervision and guidance of a Special Master. Nor did the present board suggest in the plan it submitted that it be permitted to use company funds to solicit proxies in such an election (A-407, A-419). It did, however, ask that its four members be permitted to be eligible as nominees. This request was not opposed by the SEC in the Recommendations which the SEC submitted (A-439) but was opposed by Intervenor who had expressly applied for an order disqualifying the incumbents (A-301). Ultimately, the Special Master and the District Court approved a plan which permitted the incumbents to be candidates and Intervenor took this appeal.

POINT I

NO AUTHORITY EXISTS FOR DISQUALIFYING THE INCUMBENT DIRECTORS AS NOMINEES FOR ELECTION BY THE STOCKHOLDERS

As a Florida corporation, ICC's elections are governed by the laws of that state and the charter and by-laws of the corporation (A-231 - A-255). Nowhere in the foregoing sources may any authority be found for depriving the incumbents of their right to stand as nominees for the office of director. Assuming that the federal securities laws could supersede Florida laws in this respect, no such authority has been shown in those statutes either. The only basis urged for this disqualification is that the incumbents are serving pursuant to the Final Judgment entered by the Court in March 1973. But nowhere in that Final Judgment is there any provision that directors accepting office under the judgment would thereafter be precluded from standing for election as nominees at a meeting of stockholders. Clearly, incumbents had no reason to expect that they were consenting to such disqualification by accepting office pursuant to the Final Judgment.

The SEC, at whose request the Judgment was entered, did not in its Recommendations submitted below (A-371) assert that the incumbent directors were disqualified. Certainly, if it had been the SEC's understanding that the Final

Judgment impliedly disqualified the incumbents it would have so advised the Master and the District Court in its Recommendations. The District Judge who issued the Final Judgment likewise rejected Intervenor's contention that its implicit effect was to disqualify the incumbents. We submit that if the SEC and the Court, who presumably knew what was intended by the Final Judgment, could not find such a prohibition in its provisions, by what right do Intervenor's do so?

Intervenor's ask that a rule of disqualification be imposed, but they fail to cite any authority from which such a rule may be derived. The right to stand as a nominee for corporate office is a personal right belonging to Americans, one of the "civil rights" which the law recognizes. Persons cannot be disabled from exercising such rights except (i) for a legally prescribed reason determinable in advance as say from a statute or regulation or (ii) by reason of their having consented thereto. This is essential to due process. In the instant case, there is neither a predetermined legal prescription of disqualification nor a consent. Why then impose such a penalty on four prominent men who have done nothing more than serve the company well? Why deprive the stockholders of the right to vote for said directors if they so choose or deprive the company of their services if elected.

The authorities cited by intervenors appear to us wholly inapposite:

Smallwood v. United States, 358 F. Supp. 398, 404 (E.D. Mo. 1973), aff'd w/o 486 F.2d 1047 (8th Cir. 1973), states merely that federal receivers are quasi-judicial officers and as such are entitled to invoke judicial immunity from suit for acts done by them in their official capacity.

SEC v. Beisinger Industries Corp., 421 F. Supp. 691, 696 (D. Mass. 1976), involved the appointment by the Court of a "Special Agent" to effect compliance by defendant corporations with the securities laws and an outstanding decree of the Court.

In Mosser v. Darrow, 341 U.S. 267, 271 (1951), the Supreme Court held that a trustee in reorganization under the bankruptcy laws would be surcharged for profits made by two of his employees in personal transactions relating to the business of the trust.

None of the foregoing cases have any reasonable relation to the issue in the instant case. Similarly unconnected to the specific problem at hand is the reference in Intervenor's brief to the discussion appearing in SEC v. Texas Gulf Sulphur, 446 F.2d 1301, 1307-8 (2d Cir. 1971), cert. denied, 404 U.S. 1005 (1971), of remedies available

to the Court in actions by the SEC.

In TMT Trailer Ferry Inc. v. Anderson, 334 F.2d 118 (5th Cir. 1964), rev. o/g 390 U.S. 414, 453, 454 (1968) cited by Intervenor, the Court considered an objection to a plan of reorganization under the Bankruptcy Act made by the SEC. It appeared that as part of the plan, major creditors in the reorganization entered into proposed contracts of employment with the trustee for his management of the enterprise to be reorganized. This provision was later eliminated from the plan. Nevertheless, the SEC pressed its objection to the plan. The Court ruled:

"Briefly stated, it is the contention of the appellant and the Securities and Exchange Commission that the fact that the trustee was to take over the presidency of the reorganized company vitiated the plan. It is contended that the fact that he looked forward to taking up a remunerative position with the company after it got into the hands of its creditors, gave him an interest in conflict with that of the stockholder. This conflict of interest is argued to have been fatal to the plan. We cannot agree. There is nothing presently in the Bankruptcy Law as codified or in the cases thereunder which precludes the employment of the trustee by the reorganized company....

"However, it is our opinion that a trustee would not be disinterested within the meaning of 11 U.S.C.A. § 558 if the proponents of a plan assured him of emoluments and security rather than merely nominating him for approval by the court and subject to the usual control of the Board of Directors." (Emphasis added.)

The Supreme Court, in reversing on other grounds, did not reach the question discussed above.

It should be noted that what was at issue in TMT was the highly questionable practice of a trustee negotiating with creditors for, and receiving, a personal contract at the same time he was negotiating for and preparing the plan.* There is, we submit, a good deal of difference between the above circumstances and the instant case which involves merely permitting the incumbents to be four of many candidates for possible election by the stockholders as directors of a corporation.

But, although from time to time the ICC stewardship has been referred to loosely as a "receivership," the incumbents are not technically trustees or receivers but "directors." Nor legally speaking were they actually installed into office as directors by act of the Court. The prior board of ICC installed them into office as part of ICC's performance of a consent judgment (A-326). Thus, unlike trustees or receivers, the incumbent directors are not officers of the Court. They are private citizens whom the corporation caused to be elected as directors pursuant to procedures

* Even in that egregious case, the Court did not go so far as to preclude the trustee from accepting a position from the reorganized company if done without a contract and in the customary way.

provided for in the company's by-laws (A-245) authorized under Florida law, albeit as part of ICC's implementation of the provisions of the Final Judgment to which it had consented. Their title to their office derives not from the Court, but as duly elected directors of a Florida corporation. It was precisely to avoid a legal receivership that ICC consented to the Final Judgment.

Nothing supports this view more than the Final Judgment itself, wherein it is provided that the new board would have "full power under applicable corporate law" (A-16).

Petitioners argue (A-301) that because the present Board of Directors is denominated an "interim" Board (A-16), it was intended that the members thereof not be permitted to stand for election. First, if any such implication was intended by the word "interim" as applied to the present Board, this intention would have been recognized by the Court below and the SEC. They have not done so. Second, such a construction is, we submit, wholly unwarranted. It might equally apply to the Florida corporations statute. For example, that law states:

"A director elected to fill a vacancy shall hold office only until the next election of directors by the shareholders."*

* Florida Statutes, 1975, § 607.117

Would Intervenor contend that a director so elected was disqualified from standing for office at a stockholders' meeting?

Intervenor argues that to permit the incumbents to be nominated would violate rules against conflict of interest. But it has never been deemed a conflict of interest for corporate management to stand for reelection. Under American corporate law, the existing Board holds the power and the right to exercise business judgment in the selection of nominees, including the power to determine as a matter of business judgment that one or more of the present Board should be nominated for reelection. Indeed, in most American corporations, a board of directors solicits proxies for its own election at corporate expense, see e.g. Rosenfeld v. Fairchild Engine & Air Corp., 309 N.Y. 168 (1955).

A case we believe to be particularly in point is Poirier v. Welch, 233 F. Supp. 436 (D. Col. 1964), a case which involved a board of directors originally appointed by the United States government to administer the Communication Satellite Corporation, "ComSat." At the end of its appointed term, the Government-appointed board prepared proxy material nominating six of its number for election at a shareholders' meeting. In denying a stockholder's application to enjoin the election, the Court stated, at 439:

"[H]e complains of the fact that the present directors have suggested the names of six of their number as candidates for election and are soliciting proxies accordingly. The Court finds no illegality or fraud or any other taint or infirmity in the fact that the present Board of Directors determined to propose six of their number for reelection. There is an allegation that they have not given sufficient consideration to the question whether some outsiders should be designated. On the other hand, it is asserted by the defendants that they did consider the question and determined not to bring in outsiders. In any event, in the absence of any proof to the contrary, and there is none here, the question was solely a matter of business judgment on the part of the present Board of Directors, which is not subject to judicial review."

In the instant case, outsiders are not being excluded but were and will be included in an election supervised by the Court in which numerous other candidates have been nominated. Even if all the members of the present Board are elected, they will be a minority on the new Board. The Poirier case is, we submit, a fortiori authority.

Intervenors make reference (p. 22) to certain general observations made by a member of the SEC staff about the nature of federal remedies short of receivership. (Sporkin, SEC Developments in Litigation and the Moulding of Remedies, 29 Bus. Law. 121, 123 (1974).) We see nothing inconsistent between the content of Mr. Sporkin's remarks and the decision below. In any case, whatever weight might be given

to such utterances, they certainly must be put aside, whereas in the instant case the SEC submitted official Recommendations in the proceedings below and did not join in the position contended for by intervenors.

POINT II

EVEN IF THE COURT BELOW HAD
THE AUTHORITY TO DISQUALIFY
THE INCUMBENTS, ITS DISCRE-
TION WAS CORRECTLY EXERCISED
IN REFUSING TO DO SO

As has been indicated above any number of substantial reasons existed justifying the District Court in declining to disqualify the four incumbents from being nominees for election.

There is every indication that the company's involvement in the matters which led to the incumbents' tenure will not abruptly end with the stockholders' meeting. It has also been Recommended by the SEC that after said meeting the Court retain jurisdiction over ICC for purposes of further implementing the Final Judgment and to protect the IOS Dollar Funds and other persons having claims against ICC arising from the matters in the complaint herein (A-109, par. 7). The SEC in its Recommendations has asked that Special Counsel continue his investigative and prosecutorial work even after the holding of the stockholders' meeting (A-109, par. 6). Certain internal organization problems facing the company, require an element of continuity (A-58, A-321). Even apart from these specifics, there is a pressing need for continuity. The operating management has expressed their confidence in the four incumbents (A-321). This operating management has been working

under the direction of the four incumbents for several years (A-61). It was recommended to the Court below that there be an opportunity to have continuity on the board, so that its entire constituency will not be strangers to the events which have occurred during the present board's tenure. This element of continuity is believed by management to be necessary to morale and incentive at the operating level (A-321).

It should be made clear that under the plan for the holding of the election, the board would consist of ten directors, of which the incumbents would at best be a minority of four.*

As a final safeguard, the approved plan prohibits Company money from being spent to solicit proxies for the incumbents or any other candidate (A-466). This is in no sense a rigged election or one in which management uses the proxy machinery to perpetuate itself.

When all foregoing factors are taken into consid-

* At the present time it is expected that these four will be joined by three key employees and three outsiders in standing for election in a united slate. Mr. Milton S. Gould, who has been and is counsel to the present Board will not be a candidate. It presently appears that there will be over 40 other nominees running in opposition to the incumbents, including a slate of ten proposed by the Intervenor and a slate of ten proposed by a third group.

eration, it would, we submit, have been an abuse of discretion for the District Court to have disqualified the incumbents.

The record of the present Board is meritorious. Contrary to expectations of many that the company would plunge into bankruptcy following Vesco's debacle, its affairs have been successfully turned around and it has been made profitable (A-61; see also A-185 - A-222). Perhaps for this reason, several stockholders requested that the incumbents stand for possible election by shareholders (A-324). In the light of the incumbents' record of success the Special Master was correct in concluding that stockholders at least deserved the opportunity to benefit from their experience and knowledge if they so chose (A-456).

We suggest that the Intervenor make their arguments to the stockholders of ICC, rather than try to deprive the stockholders of ICC of the opportunity to consider the candidacy of four directors who have served the company well.

CONCLUSION

For all of the foregoing reasons, the District Court's order below should be affirmed.

Dated: New York, New York
January 23, 1978.

Respectfully submitted,

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on see Attached List

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Sworn to before me this
23 day of January, 1978.

JOHN V. D'ESPOSITO
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